

**Regional Water Quality Control Board
Central Valley Region
Board Meeting – 26/27 October 2006**

**Response to Written Comments to
City of Livingston Industrial Wastewater Treatment Facility
Tentative Cease and Desist Order**

At a public hearing scheduled for 26/27 October 2006, the Regional Water Quality Control Board, Central Valley Region, (Regional Water Board) will consider adoption of a Tentative Cease and Desist Order (TCDO) for the City of Livingston (City) Industrial Wastewater Treatment Facility (IWWTF). To address groundwater nitrogen pollution at the site, the City is proposing to upgrade the IWWTF to implement biological nitrogen removal (IWWTF Upgrade Project). The TCDO proposes to impose a time schedule requiring the completion of the IWWTF Upgrade Project within the next two years.

This document contains responses to written comments received from two interested persons regarding the TCDO circulated on 30 August 2006. Written comments from interested persons were required by public notice to be received by the Regional Water Board by 2 October 2006 to receive full consideration. Comments were received on 2 October by e-mail from:

1. Foster Poultry Farms (Foster Farms)
2. California Sportfishing Protection Alliance (CSPA)

Written comments from the above parties are summarized below, followed by the response of the Regional Water Board.

FOSTER FARMS COMMENTS

FOSTER FARMS – COMMENT No. 1: Foster Farms states, “Foster Farms will be submitting our Report of Waste Discharge ("ROWD") for a Biological Nitrogen Removal ("BNR") plant to the RWQCB by 25 October 2006. We believe that since we are submitting a ROWD for a BNR prior to the Public Hearing date for the City of Livingston's CDO, that Board consideration of the CDO should be delayed for at least one month. Issuance of the CDO will likely be unnecessary and confusing.”

RESPONSE: The TCDO addresses violations and threatened violations of Waste Discharge Requirements (WDRs) Order No. 79-209 by the City, which is the named Discharger and owner and operator of the IWWTF, not Foster Farms. The TCDO does not preclude Foster Farms from submitting a ROWD, obtaining the appropriate permits and WDRs, and initiating discharge from its own BNR plant. However, that ROWD has yet to be submitted, may not be complete when and if it is submitted, and must undergo local approval, including CEQA approval. It is by no means certain, and note that the Discharger itself has proposed to implement a plan to resolve ongoing violations of its WDRs. The submittal of a ROWD by Foster Farms would not affect the terms and conditions of the TCDO (see Response to Foster Farms Comment No. 4) unless the City identified the Foster Farm's project as the intended means of compliance. The TCDO remains scheduled for consideration at the October 2006 meeting.

FOSTER FARMS – COMMENT No. 2: Staff Report Page 1, Paragraph 1, Line 2. Foster Farms requested this sentence be revised to read: "... provides industrial ~~sewage~~ wastewater service..."

RESPONSE: The revision is included in the agenda material.

FOSTER FARMS – COMMENT No. 3: Staff Report, Page 1, Paragraph 2, Lines 8-12: Foster Farms requested the following be deleted: "Disagreements between the City and Foster Farms over which treatment technology to select for the IWWTF Upgrade Project has delayed its construction and implementation for more than two years. Recent events unrelated to the IWWTF Upgrade Project has strained the working relationship between the City and Foster Farms."

RESPONSE: The information is relevant to the existing situation and no change was made.

FOSTER FARMS – COMMENT No. 4: Staff Report, Page 1, Paragraph 2, Lines 8-12: Foster Farms requests the following be added: "Foster Farms has advised the Regional Water Board that it intends to submit a Report of Waste Discharge to design, build, and operate a biological nitrogen removal plant for its wastewater ("BNR Plant") by October 25, 2006 (prior to the Public Hearing to consider this Cease and Desist Order). In that event, this Cease and Desist Order ("CDO") will be amended accordingly. The Regional Board does not object to Foster Farms designing, building and operating the BNR Plant."

RESPONSE: The agenda material now contains the following paragraph that was added after the last paragraph on Page 11 of the Staff Report: "Foster Farms has recently advised Regional Water Board staff that it intends to submit by 25 October 2006 a Report of Waste Discharge in support of a discharge from its own biological nitrogen removal treatment plant, which it proposes to construct by the 31 December 2008 deadline established in the proposed Cease and Desist Order. The construction and operation by Foster Farms of its own treatment plant will obviate the need for the City to implement its proposed IWWTF Upgrade Project. In that event, staff will propose the Regional Water Board revise the Cease and Desist Order accordingly."

FOSTER FARMS – COMMENT No. 5: Staff Report, Page 2, Paragraph 4, Line 2: Foster Farms requested that this line read: "...by approximately ~~150~~ 146 acres ..."

RESPONSE: The agenda material reflects this change, as does the proposed TCDO, (Finding 3, Line 7).

FOSTER FARMS – COMMENT No. 6: Staff Report, Page 2, Paragraph 3, Line 10: Foster Farms requested the following edit, which is reflected in the agenda material: "...effluent in the expansive expanded area..."

FOSTER FARMS – COMMENT No. 7: Staff Report, Page 5, Last Paragraph, Lines 1-2 and Page 6, Paragraph 1, Lines 1-3: Foster Farms requests these lines read: “In late 2000, Foster Farms installed eight additional wells for the Discharger ~~installed seven additional wells.~~ The current network consists of nine wells (MW-2 was decommissioned by Foster Farms following problems with the well): an upgradient well near a surface water irrigation canal (MW-9), three wells directly along the Merced River (MW-2~~1~~, MW-5 and MW-7), one well within the immediate area of Ponds 1 and 2 (MW-4), and five ~~four~~ wells within various areas of the ponds (MW-3, MW-6, MW-9, MW-10, and MW-11).

RESPONSE: Page 3, Line 1 of the Staff Report in the agenda now reads: “In late 2000, ~~the Discharger~~ Foster Farms installed ~~seven~~ eight additional wells.” Regarding the monitoring well numbering, groundwater monitoring reports submitted by Foster Farms’ consultant, indicate that MW-1 was destroyed and replaced with a new monitoring well MW-7. Monitoring reports also include results for MW-2, but not MW-1. Therefore, the monitoring well numbering in the TCDO remains unchanged.

FOSTER FARMS – COMMENT No. 8: Staff Report, Page 5, Paragraph 3, Line 2: Foster Farms requested this sentence be revised to read: “...is dominated by seepage of ~~exceptionally high quality~~ canal water...”

RESPONSE: As staff believes the revision inappropriate, no change was made to agenda material.

FOSTER FARMS – COMMENT No. 9: Staff Report, Page 6, Paragraph 5, Line 9: Foster Farms requested this sentence be revised to read: “In 2006, ~~the City’s~~ Foster Farms’ consultant...”

RESPONSE: The revision is included in the agenda material.

FOSTER FARMS – COMMENT No. 10: Staff Report, Page 10, Paragraph 3: Foster Farms requested the following sentence be added to the end of this paragraph: “In the event that Foster Farms applies to design, build, and operate the BNR Plant, such action would be deemed compliance for the City.”

RESPONSE: The change was not made. The City has a noncompliant IWWTF regardless of whether Foster Farms is able to successfully initiate its own discharge.

FOSTER FARMS – COMMENT No. 11: Staff Report, Page 10, Paragraph 3: Foster Farms requested the TCDO time schedule be revised as follows:

- Submit by 15 May ~~2007~~ 2008 written evidence that CEQA has been satisfied for the IWWTF Upgrade Project

- Submit by 15 June ~~2007~~ 2008 written evidence that construction of the IWWTF Upgrade Project has begun
- Submit by 15 January December 2009 written evidence that the IWWTF Upgrade Project is complete
- Submit by 15 January December 2009 an operations and maintenance manual of the upgraded IWWTF

RESPONSE: The City has proposed a schedule for a project that it intends to implement to correct ongoing violations and the TCDO reflects that schedule. No change to the schedule was made in the agenda material.

CALIFORNIA SPORTFISHING PROTECTION ALLIANCE (CSPA) COMMENTS

CSPA – COMMENT No. 1: CSPA requests status as a designated party for this proceeding.

RESPONSE: The request has been granted.

CSPA – COMMENT No. 2a: CSPA states that the TCDO does not restrict the discharge flow despite the Order's findings that the IWWTF is significantly over capacity.

RESPONSE: WDRs Order No. 79-209 specifies a 3.5 million gallon per day (mgd) flow limit that applies to the discharge. The TCDO reinforces this flow limit (see Response to CSPA Comment No. 2d).

CSPA – COMMENT No. 2b: CSPA states the Regional Water Board has encouraged and approved a piecemeal approach to the California Environmental Quality Act (CEQA), revised WDRs and enforcement orders involving the Discharger's plant expansion projects.

RESPONSE: Finding 28 of the TCDO clearly states that the issuance of the TCDO is exempt as an enforcement action by a regulatory agency pursuant to section 15321(a)(2), Title 14, California Code of Regulations. Other enforcement will also be exempt. Issues related to CEQA and the City's IWWTF Upgrade Project must be addressed by the lead agency as part of the City's Upgrade Project, and this is expected to be the City. Regardless, the project may not be permitted by WDRs until CEQA is satisfied.

CSPA – COMMENT No. 2c: CSPA indicates that the Regional Water Board should direct staff to initiate enforcement against Foster Farms for discharging treated poultry wastewater to its Expanded Reclamation Area before 30 October 2006, the date after which discharge would be authorized in accordance with California Water Code (CWC) §13264(2).

RESPONSE: Foster Farms has yet to discharge to the Expanded Reclamation Area as it is still waiting approval from the City for the appropriate grading permits and thus has not

violated the CWC. Regardless, as explained in the Staff Report, by 30 August 2006 letter Regional Water Board staff advised the City and Foster Farms that no enforcement would be initiated against Foster Farms for such discharge if done in accordance with its technical proposal. This was considered reasonable at the time considering that it was solely a reclamation area expansion and technically sound as compared to risk of uncontrolled discharges to the Merced River from threatened levees at the IWWTF ponds.

CSPA – COMMENT No. 2d: CSPA states that the TCDO does not assess any monetary penalties for the past and ongoing violations, and estimates the City realized an economic benefit of approximately 1.8 million dollars from delaying completion of the IWWTF Upgrade Project.

RESPONSE: No change in the proposed action has been made. The purpose of the TCDO is to establish a formal and enforceable time schedule to cease and desist from causing violation of WDRs and pollution. Whether assessment of administrative civil liability should be considered for causing pollution and indirectly for delays in implementing the project is a separate matter. Adoption of the proposed CDO does not preclude such an action.

CSPA – COMMENT No. 2e: CSPA notes that groundwater underlying the IWWTF is polluted and that the TCDO does not require the City to conduct any groundwater investigation and cleanup or evaluate the degree of hydraulic connectivity to the Merced River.

RESPONSE: No change in the proposed action has been made. Pursuant to CWC §13304, the Regional Water Board may consider, as part of a separate enforcement action, a cleanup or abatement order to address issues related to the investigation of the extent of the water quality impacts at the IWWTF and appropriate cleanup. However, the purpose of the proposed TCDO is to establish a firm schedule to stop ongoing contributions to the pollution.

CSPA – COMMENT No. 2f: CSPA states that the Regional Water Board has failed to protect the public health by not notifying the surrounding property owners or downstream riparian owners that the groundwater is polluted.

RESPONSE: The purpose of the proposed TCDO is to establish a firm schedule to abate the cause of the pollution. Regional Water Board practice is to notify owners of wells when aware of an exceedance of any MCL. More thorough investigation of potentially affected parties will be appropriate as a part of any cleanup or abatement action taken by the Regional Water Board.

CSPA – COMMENT No. 3: CSPA states a Time Schedule Order (TSO) should be issued in accordance with CWC §13308 in conjunction with the TCDO.

RESPONSE: The proposed action has not been changed. The TCDO will establish an enforceable time schedule for the IWWTF Upgrades Project. A TSO would establish potential penalties in advance based on violation of the time schedule, but it would still require a public hearing on whether to impose the amounts as set. If the City should violate the time schedule in the TCDO, additional enforcement may be appropriate at that time, including the consideration of a time schedule order or direct assessment of civil administrative remedies in the absence a TSO.

CSPA – COMMENT No. 4: CSPA states that the TCDO fails to address the economic benefit the City derived from the delay of the IWWTF Upgrade Project and fails to show costs incurred by the Regional Water Board for staff time spent developing the TCDO. CSPA further states that the TCDO fails to assess monetary penalties for flagrant violations of WDRs. CSPA calculates economic benefit at approximately 1.8 million dollars and states it should be recovered. Lastly, CSPA states the TCDO should include a finding that the discharge threat to water quality and complexity is 1A [as defined in Title 23, California Code of Regulations, §2200].

RESPONSE: Comments not relevant to the proposed action. See Response to CSPA - Comment 2d.

CSPA – COMMENT No. 5: CSPA states that the frequent occasions of pond freeboard encroachment threatens to cause impounded wastewater to overflow to the Merced River and it recommends the TCDO limit flow to the IWWTF to 3.5 mgd to limit groundwater degradation and reduce the threat of overflows, and also require the Discharger to monitor available freeboard in IWWTF ponds on a daily basis whenever ponds have less than three feet of available freeboard.

RESPONSE: The TCDO does not alter the flow restriction in the WDRs. Flow beyond what is allowed by the WDRs may subject the City to administrative civil liability.

CSPA – COMMENT No. 6: CSPA states that the TCDO fails to require a spill plan intended to prevent overtopping and catastrophic failures of pond berms. CSPA recommends the TCDO require the Discharger develop a detailed spill prevention and mitigation plan that describes in detail the steps taken to prevent and minimize any discharge of wastewater to surface waters.

RESPONSE: We concur. The following Late Revision to the TCDO is now proposed as an additional Order Paragraph to be inserted as a new number 3:

By 27 November 2006, the Discharger shall submit a spill prevention plan (SPP) describing all measures and controls it determines necessary to preclude any preventable discharge of pollutants to the Merced River, and contingencies to minimize any discharge that occurs for reasons beyond its control and that will measure and minimize its affects. The SPP shall include detailed actions to (a) ensure rated storage capacity, (b) monitor the risk and potential means of discharge (i.e., pond freeboard,

compromised levees, etc.), and (c) mitigate and control the risk (e.g., timely pumping of wastewater from the pond, reducing flows to the IWWTF, etc.). The contingency portion of the SPP shall provide for appropriate agency notifications, monitoring of pollutants in water in the river, mitigations to protect public health impacts (e.g., posting the Merced River, monitoring upstream and downstream of the spill, etc.).

CSPA – COMMENT No. 7: CSPA states that the TCDO fails to require the Discharger to comply with Title 27 requirements (i.e., Title 27, CCR, §§20005 et seq.) when it is warranted due to waste constituents in concentrations exceeding water quality objectives and the polluted underlying groundwater.

RESPONSE: The City was advised years ago that it either had to treat the discharge such that it complied with the Basin Plan or contain the discharge pursuant to Title 27. The City has proposed a project that from all appearances will comply with the Basin Plan and thus be exemptible from Title 27 containment. As previously noted, the pollution caused by the ongoing discharge is subject to investigation and cleanup, but it is not reason alone to require containment pursuant to Title 27. Some aspects of the upgraded discharge operation may not be exempt from Title 27 and these aspects will be required to comply fully with Title 27.

CSPA – COMMENT No. 8a: CSPA states that the TCDO fails to consider the state's Antidegradation Policy (State Water Resources Control Board Resolution No. 68-16, *Statement of Policy with Respect to Maintaining High Quality Waters in California*). Specifically, CSPA states the TCDO finding (in Finding 20) that degradation from the IWWTF Upgrade Project is consistent with the Antidegradation Policy (Finding 20) is not supported by fact and to determine such necessitates a complete socioeconomic analysis. CSPA recommends the TCDO be amended to require an actual antidegradation analysis conducted in accordance with the State Antidegradation Policy.

RESPONSE: Adoption of a TCDO does not require an antidegradation analysis, but the WDRs for the Upgrade Project will require one. Finding 20 as proposed was intended to provide the Discharger some confidence from the Regional Water Board that the technology of the proposed project for which the Regional Water Board is specifying an enforceable schedule and the Discharger will be expending millions will ultimately be decided to be BPTC. A complete antidegradation analysis will be conducted during the process of developing and issuing waste discharge requirements. Finding 20 of the TCDO is specific to nitrogen, the waste constituent specifically identified as causing pollution. To continue discharge, technology must be identified that represents BPTC and is capable of minimizing the impact from nitrogen on groundwater and to ensuring it is less than the applicable water quality objective. At Regional Water Board staff direction, the City and Foster Farms' consultants conducted an extensive evaluation of technologies available, technologies used successfully by others, and promulgated to reduce nitrogen in poultry wastewater. The evaluation included a cost analysis for different treatment alternatives, including comparison of anticipated effluent quality with the U.S. Environmental Protection

Agency (USEPA) draft guidelines for poultry processing effluent quality. Based on the technical and cost analysis submitted, and the need for some level of assurance to the Discharger before it entered contract commitments for a multimillion dollar upgrade that the upgrade would ultimately satisfy antidegradation criteria for nitrogen, Regional Water Board staff tentatively accepted the technology as being BPTC. The technology provides flexibility in design that can achieve increasingly stringent effluent concentrations for nitrogen at increasing cost. The effluent limitation that minimizes nitrogen degradation to less than the water quality objective and is found to be of maximum interest to the people of the State will be determined through the permitting process by the Regional Water Board, and it will be less than a total nitrogen of 10 mg/L and by means of this technology. The final effluent limitation for nitrogen, and the appropriate technology and limits for other waste constituents (e.g., salts, pathogens, etc.) must still be assessed for consistency with the Antidegradation Policy as part of the permitting process.

With the above in mind, staff proposes in response to the CSPA concern that Finding 20 be amended as follows:

“BPTC Determination. Regional Water Board staff letter dated 9 May 2003 concurred with the Facility Plan stating that it provided sufficient technical justification to determine that the biological nutrient removal technology proposed reflects BPTC. The technology implemented for nitrogen removal will ~~is expected to~~ reduce effluent total nitrogen to less than 10 mg/L and reflects BPTC with respect to nitrogen, but the effluent limitation that will result in BPTC and will minimize degradation consistent with State Water Board Resolution 68-16 shall be determined by the Regional Water Board at a later date and BOD and total suspended solids to less than 10 mg/L each. ~~The IWWTF Upgrade Project will allow Foster Farms, the sole discharger to the IWWTF, to continue to be a major employer in the local area and contribute to the local, regional, and State economy. Considering site-specific information regarding the discharge and water quality, the degradation to groundwater from nitrate resulting from the proposed discharge is consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial uses of area groundwater, and will not result in groundwater containing nitrate in excess of the WQO.”~~

CSPA – COMMENT No. 8b: CSPA states the Discharger should evaluate the full range of water quality problems created (or threatened) by the current IWWTF before the Regional Water Board requires the Discharger to undertake remedial modification of IWWTF ponds and construct the IWWTF Upgrade Project, which features biological nitrogen removal. This evaluation may reveal additional treatment or control measures are necessary beyond those included in the IWWTF Upgrade Project and cause the upgraded IWWTF to be in noncompliance upon its completion. CSPA states that such an approach may be setting the Discharger up for failure, is contrary to the Antidegradation Policy, and is ultimately unfair to the Discharger. CSPA recommends TCDO be amended to require the Discharger to complete

a water quality characterization of the wastewater, groundwater, and surface water; a constituent-by-constituent antidegradation analysis that includes treatability evaluations, and CEQA compliance.

RESPONSE: In addition to the Response to CSPA – Comments No. 8a, the Discharger was advised some time ago and remains fully aware of the scope of required antidegradation analysis. An ongoing and at least partially successful effort is underway to reduce salinity and this effort will be evaluated with respect to BPTC.

CSPA – COMMENT No. 10: CSPA states the TCDO fails to protect public health and should require the Discharger test and provide alternative drinking water for domestic wells that have been impacted by the IWWTF.

RESPONSE: See Response to CSPA – Comment Nos. 2e and 2f.

CSPA – COMMENT No. 11: CSPA states that the TCDO fails to enforce against an illegal discharge as it does not include action against Foster Farms for initiation of discharge of treated wastewater to its Expanded Reclamation Area prior to 20 October 2006, the date after which discharge would be authorized to this area by CWC §13264(2). CSPA indicates that Foster Farms' ability to accept IWWTF effluent for reuse as irrigation supply is a critical component of IWWTF capacity and says it must be included in the TCDO and any revised WDRs for the IWWTF.

RESPONSE: While the capacity of the IWWTF is dependent upon adequate disposal capacity at the Site, the Site is regulated by other WDRs that name Foster Farms. This is not unlike many water reclamation requirements. Foster Farms has not initiated discharge to the Expanded Reclamation Area, and thus whether such discharge in violation of its WDRs should be subject to enforcement is not an issue. Regardless, such violation would be separate and distinct from pollution violation at the IWWTF owned and operated by the City. It may be appropriate to include Foster Farms in revised WDRs and in cleanup and abatement actions. It is not appropriate to include Foster Farms in the TCDO for violation of WDRs in which it is not named.